Office - Supreme Court, U.S.
FILED
MAY 6 1982
ALEXANDER L. STEVAS
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC., Petitioner,	)	
v.	)	No. 81-1958
MID-LOUISIANA GAS COMPANY, et al. Respondents.	)	

RESPONSE OF EL PASO NATURAL GAS COMPANY IN OPPOSITION TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

C. Frank Reifsnyder
Hogan & Hartson
815 Connecticut Avenue
Washington, D. C. 20006

Donald J. MacIver, Jr.
General Counsel
Richard Owen Baish
Scott D. Fobes
El Paso Natural Gas Company
P. O. Box 1492
El Paso, Texas 79978

Of Counsel for

El Paso Natural Gas Company

May 6, 1982

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,	)	
Petitioner,	)	
v.	)	No. 81-1958
MID-LOUISIANA GAS COMPANY, et al.	)	
Respondents.	)	

RESPONSE OF EL PASO NATURAL GAS COMPANY IN OPPOSITION TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

El Paso Natural Gas Company (hereinafter "El Paso"), */ pursuant to Rule 42.4 of the Rules of the Supreme Court of the United States, respectfully submits this response in opposition to the Motion of Petitioner for Contemporaneous Consideration and Disposition of Petitions for Certiorari. The motion of Arizona Electric Power Cooperative, Inc. ("AEPCO") is dated April 22, 1982, and was received by counsel for El Paso on April 26, 1982. El Paso was an intervenor in the proceedings before the United States Court of Appeals for the Fifth Circuit in this case.

AEPCO's motion should be denied in all respects.

1. AEPCO erroneously contends that the Fifth Circuit's decision in this case and the decision of the West Virginia Supreme Court of Appeals in Pennzoil Co. v. Public Service Commission of West Virginia, Case No. 80-175-G-42T, Dec. 10, 1981, petition for certiorari filed, No. 81-1672 (March 10, 1982) involve the same legal question. In the administrative orders at issue in Pennzoil, the Public Service Commission

---

*/ El Paso is a substantially wholly owned subsidiary of The El Paso Company. El Paso's subsidiaries or affiliates (other than subsidiaries and affiliates that are wholly owned by El Paso or The El Paso Company) are:

Desert American Insurance Agency
El Paso Europe-Afrique, S.A.
Geonuclear Nobel Paso

of West Virginia held that the Natural Gas Policy Act of 1978, P.L. No. 85-621, 92 Stat. 3350 (1979) (codified at 15 U.S.C. Sections 3301, et seq.,) (hereinafter "NGPA") had not preempted the Commission's authority under state law to regulate Pennzoil's sale of its own natural gas production. Although the state commission affirmed the ruling of the Hearing Examiner that Pennzoil's sales of its production were not "first sales" within the meaning of Section 2(21) of the NGPA, the Commission also agreed with the Hearing Examiner's determination that NGPA Section 602(a) established an independent and self-sufficient basis for the Commission's rate order in that case. */ Since a determination of the "first sale" question would not be dispositive of the issues in Pennzoil, therefore, no basis has been shown for contemporaneous consideration of that case and the instant case.

Moreover, contrary to AEPCO's assertion (Motion at 2), the Supreme Court of Appeals of West Virginia did not adopt as a basis for its decision the Federal Energy Regulatory Commission's ("FERC's") orders that were reviewed by the Fifth Circuit in this case. Instead, that Court was completely silent with respect to the grounds for its decision. It is therefore apparent that AEPCO is seeking to create the impression of a conflict among the courts when, in fact, none exists.

---

*/ In its brief to the Supreme Court of Appeals of West Virginia, the West Virginia Commission stated:

> Thus, if for any reason the Court should reject the Commission's position that Company production does not qualify as a first sale under the NGPA, the Commission would submit that §602(a) of the Act recognizes the Commission's proper exercise of its ratemaking authority.

See Pennzoil's Petition for Certiorari in Case No. 81-1672 at 13.

2. Finally, AEPCO has not shown any basis for summary reversal of the Fifth Circuit's decision. That decision, rendered by a unanimous panel, reflects a thorough consideration of petitioner's arguments and those of the FERC concerning the statutory "first sale" definition. Moreover, its opinion rests not only on an analysis of the statutory language, but on a careful review of the statute's purpose and legislative history as well. In these circumstances, and in view of the present status of the record before this Court, summary reversal would be singularly inappropriate.

Respectfully submitted,

EL PASO NATURAL GAS COMPANY

By
C. Frank Reifsnyder

Donald J. MacIver, Jr.
General Counsel
Richard Owen Baish
Scott D. Fobes
El Paso Natural Gas Company
P. O. Box 1492
El Paso, Texas 79978

C. Frank Reifsnyder
Richard C. Green
Hogan & Hartson
815 Connecticut Ave., N.W.
Washington, D. C. 20006

Of Counsel for

EL PASO NATURAL GAS COMPANY

Dated: May 6, 1982